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In The

Supreme Court of the United States

JAMES LYSAGHT, PETER KRAMER
AND RICHARD HARTMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Acknowledged Split of Federal Authority on the Scope of RICO Conspiracy Liability Justifies the Review of This Court 2

II. This Court Should Grant Review of the Second Circuit's Significant Departure from Procedural Default Doctrine and the Federal Rules of Appellate Procedure 4

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Bucklew v. United States, 575 F.2d 515 (5th Cir. 1978) 6

Johnson v. Zerbst, 304 U.S. 458 (1938) 5, 6, 10

Reves v. Ernst & Young, 507 U.S. 170 (1993) 1, 2, 3, 4

Salinas v. United States, 522 U.S. 52 (1997) 1, 2, 3, 4

United States v. Amen, 831 F.2d 373 (2d Cir. 1987) 9

United States v. Benevenuto, 836 F.2d 60 (2d Cir. 1987) 9

United States v. Joyner, 201 F.3d 61 (2d Cir. 2000) 9

United States v. Olano, 507 U.S. 725 (1993) 5, 7

United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984) 9

United States v. Quiroz, 22 F.3d 489 (2d Cir. 1994) 5

Yakus v. United States, 321 U.S. 414 (1944) 5

STATUTES AND OTHER AUTHORITIES:

18 U.S.C. § 1962(c) 1, 2, 3, 4

18 U.S.C. § 1962(d) 4

Fed. R. App. P. 10(e) 7

Fed. R. App. P. 28(a) 7

Fed. R. Crim. P. 52 7

INTRODUCTION

This Court requested that the Solicitor General file a brief in response to the petition for a writ of certiorari by Petitioners James Lysaght, Peter Kramer, and Richard Hartman. In its Opposition Brief, the Solicitor General acknowledges that a split of circuit authority exists on the RICO conspiracy issue presented by Petitioners, but contends that this split of authority was resolved when this Court's opinion in *Salinas v. United States*, 522 U.S. 52 (1997) implicitly overruled this Court's earlier opinion in *Reves v. Ernst & Young*, 507 U.S. 170 (1993) with regard to alleged conspiracies to violate 18 U.S.C. § 1962(c). If anything, the government's contention underscores the need for this Court to resolve not only the split of circuit authority but also the alleged split of authority in this Court.

On the second issue, the Solicitor General declines to endorse the holding of the Second Circuit that an appellate litigant can obtain plenary review of issues not raised in the District Court or in its Appellate Brief absent a knowing and intelligent waiver of the issue by the litigant. Rather, the Solicitor General correctly frames the issue as one of procedural default (i.e., forfeiture, not waiver),[1] and in so doing supports the position of Petitioners and of Judge Oakes in dissent below, that such untimely raised issues are subject to the procedural default doctrine.

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[1] Opposition Brief, at I (identifying as forfeiture issue).

ARGUMENT

I. The Acknowledged Split of Federal Authority on the Scope of RICO Conspiracy Liability Justifies the Review of This Court.

The government agrees that a split exists in the circuit courts over the RICO conspiracy issue presented by Petitioners for this Court's review. Opposition Brief, at 8 (acknowledging a split among six circuits). The government also does not contend that the facts or circumstances of this case provide an unsuitable vehicle for resolving this split in the circuit courts. For example, the government does not dispute that the District Court's findings undermine the existence of any agreement between the Petitioners (RICO enterprise outsiders) and those inside the enterprise who operated and managed it (the New York Transit Benevolent Policemen's Association), including that Petitioners were not "directly or indirectly" involved in the operation of the RICO enterprise and that its managers concealed their activities from Petitioners, acted independently of Petitioners, and acted against Petitioners' interests. (D. Apx. at 1151-52).

Instead, the only objection to review offered by the Solicitor General is the assertion that this Court has previously resolved this split of circuit authority in *Salinas v. United States*, 522 U.S. 52 (1997). According to the government, this Court held in *Salinas* that a RICO conspiracy to violate 18 U.S.C. § 1962(c) does not require an agreement to violate 18 U.S.C. § 1962(c), as that offense has been defined by this Court in *Reves v. Ernst & Young*, 507 U.S. 170 (1993). *Salinas* did not, as the government contends,

implicitly overrule *Reves*.[2] More to the point, this Court is the most appropriate forum in which to resolve whether one precedent of this Court (*Salinas* in 1997) implicitly overruled another precedent of this Court (*Reves* in 1993).

The core legal issue remains whether a conspiracy to violate subsection 1962(c) requires a finding that a defendant agree to commission of the object subsection 1962(c) offense, as this Court has defined that offense in *Reves*. In *Reves*, this Court placed substantive limitations upon the RICO liability of accountant outsiders to a RICO enterprise under subsection 1962(c), and the Court thereby restricted the liability of outsiders to those who operated or managed the affairs of an enterprise through racketeering activity. The distinction made by this Court in *Reves* was between outsider defendants who conducted "their *own* affairs" through racketeering activity (a matter not proscribed by subsection 1962(c)) versus defendants who conducted "the *enterprise's* affairs" in this manner (the conduct Congress penalized in subsection 1962(c)). *Reves*, 507 U.S. at 185 (emphasis in the original).

By contrast, the *Salinas* opinion did not speak to outsider liability at all. The *Salinas* case addressed the RICO conspiracy liability of an enterprise insider (a deputy sheriff) for facilitating a prison bribery scheme operated by his superior (the sheriff). *Salinas*, 522 U.S. at 54. The *Salinas* opinion held that RICO conspiracy liability did not require, as some lower courts had held, that a defendant agree personally to commit two underlying racketeering acts ("predicate acts"). *Id.* at 477-78. This

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[2] The *Salinas* opinion did not cite, or otherwise, refer to the *Reves* opinion.

ruling, however, has no application in this case. More apt is the language of the *Salinas* opinion reaffirming the fundamental conspiracy principle that "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense. . . . " *Id.* at 477. As applied to this context, a conspirator must agree to the commission of a subsection 1962(c) offense that falls within the ambit of the *Reves* opinion. To paraphrase *Reves*, a conspiracy to conduct one's *own* affairs, rather than an *enterprise's* affairs, is simply not a conspiracy proscribed by either subsection 1962(c) or subsection 1962(d).

Review by this Court is appropriate not only to resolve the acknowledged split in circuit authority, but also to resolve the alleged split in the precedent of this Court upon which the government now relies. If, as the government posits, a conspiracy to violate subsection 1962(c) can exist even without an agreement to commit a substantive RICO violation under *Reves*, then the limitation on the RICO liability of enterprise outsiders enacted by Congress and upheld by this Court in *Reves*, will be of no effect.

II. This Court Should Grant Review of the Second Circuit's Significant Departure from Procedural Default Doctrine and the Federal Rules of Appellate Procedure.

Petitioners also seek review of the issue of whether a litigant's failure to raise an issue in the District Court or in its Appellate Brief constitutes a procedural default of the issue, as dissenting Judge Oakes would have held below. 92a The majority opinion of the Second Circuit

held instead that a litigant's failure to raise a record challenge in the District Court or in its Appellate Brief does not constitute a procedural default because the knowing and intelligent waiver standard applies to such issues. 49a n.11 (describing "knowing abandonment of a right," and examining knowledge of government to determine if issue properly raised). *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The Solicitor General's Opposition Brief fails to support the Second Circuit's holding that a litigant can obtain plenary appellate review of issues not raised in the District Court or in their appellate briefs based solely upon a claim of ignorance. Such a precedent is a clear departure from the precedent of this Court in *United States v. Olano*, 507 U.S. 725 (1993), in which this Court reaffirmed the longstanding distinction between a forfeited issue and a waived right, and placed fundamental limitations on the scope of appellate review over forfeited issues. 507 U.S. at 731 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

Nor does the Solicitor General confront the obvious institutional problems that will be created if appellate litigants could, based solely upon a subjective showing of ignorance or lack of intelligence, obtain plenary appellate review of issues raised for the first time after the filing of their Appellate Brief. To the contrary, the Solicitor General's own brief employs the very standard for procedural default urged by Judge Oakes in his dissent below (91a, citing *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994)) – the manifest injustice standard. *Accord*, Opposition Brief, at 11 (citing and relying upon the procedural default standard of "manifest injustice" from *United States v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994)). In other words, even the government cannot support the knowing

and intelligent standard adopted and applied by the majority opinion below, and instead urges that the procedural default standard of "manifest injustice" should restrict appellate review of untimely raised issues. In this regard, Petitioners and Respondent agree, and they are joined by Judge Oakes' dissent, but not by the majority opinion, below.

Rather than defend the majority holding of the Second Circuit, the government attempts to justify the majority opinion's ruling on the merits of the issue untimely raised – whether the official record was correct (as the District Court reaffirmed under oath and with documentary corroboration) or whether it was inaccurate. The government overlooks, however, not only the abundant record support for the District Court's sworn reaffirmation of the record's accuracy, but more importantly the whole purpose of procedural default rules – to require litigants timely to raise issues upon pain of forfeiture. As Judge Oakes persuasively pointed out in his dissent, the " 'procedural default rule has especially clear application' " to the untimely raised record issue in this case. 89a (quoting *Bucklew v. United States*, 575 F.2d 515, 520 (5th Cir. 1978)). Here, the government's delay not only deprived Petitioners of the opportunity of addressing the issue in the District Court or in their Appellate briefs, it also burdened the District Court (and the appellate court) with the task of reconstructing actions occurring in the District Court more than a year after the events at issue. 92a.

While the Solicitor General would, unlike the majority opinion below, apply the procedural default doctrine (and not *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) to such a forfeited claim, the Solicitor General's tardy claim in

this Court that reversal would result in a "manifest injustice" under this doctrine cannot be sustained on this record. Judge Oakes indicated in his dissent that the jury charge error reflected in the official record required reversal, 93a, and the majority opinion agreed with Judge Oakes about the harmfulness of this error. 25a ("difficult to . . . determine them to be harmless"). Indeed, even the District Court's contemporaneous laptop computer notes reflected its awareness that the instruction just given was error. 83a. Moreover, the lead prosecutor conceded near the close of trial that the government's evidence against these Petitioners "was not the most compelling case." (D. Apx. at 1020)

The government suggests that this Court's opinion in *Olano* is inapplicable to appellate proceedings or to motions under Fed. R. App. P. 10(e). Opposition Brief, at 11. The *Olano* opinion, however, was an articulation of the appropriate "limitation[s] on appellate authority" compelled by Rule 52 of the Rules of Criminal Procedure as a result of a litigant's failure to raise an issue in the district court. *Olano*, 507 U.S. at 732. Here, not only did the government fail to raise a record issue in the District Court, it failed to raise a record issue up through the filing of its Appellate Brief. This was not an oversight. The government's appellate brief cited, and quoted verbatim, the challenged portion of the jury charge; endorsed it as the charge actually given by the court; and then defended the charge as legally correct. GB, at 42-45.[3]

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[3] The Opposition Brief fails to address the obligation of litigants imposed by Fed. R. App. P. 28(a) to raise their issues at the time of filing their Appellate Briefs, along with supporting record citation.

The pertinent legal issue was also the first issue raised in Petitioners' Appellate Brief, and it consumed the largest section (17 pages) of the Government's Appellate Brief.

Further, the Solicitor General's suggestion that it failed to raise a record issue in its 156 page Appellate Brief because the seven prosecutors who authored the brief (including two trial prosecutors) were under significant time pressures, is contradicted by the appellate record. The government sought, and obtained two consecutive thirty-day extensions of time in which to file its Appellate Brief, affording the seven government counsel a total of ninety days in which to submit their brief.

Contrary to the Solicitor General's suggestion, Petitioners do challenge the majority opinion's conclusion that the challenge instruction was not actually given. The evidence corroborating the original official record includes: (a) the District Court's sworn declaration (96a-99a) that it charged the jury in accordance with its handwritten notes on the court's version of the charge (80a-82a); (b) the contemporaneous laptop computer notes of the District Court describing a confrontation with its law clerk over this very language in the charge (83a); (3) the sworn declaration of the court's law clerk that the charge contained in the official record was actually given to the jury (Acevedo Aff. ¶ 7); (4) the contemporaneous curative jury charges drafted by the Court's law clerk at the Court's request attempting to correct this very charge error (80a-82a); and (5) the affidavit of appellate government counsel that the trial prosecutors could not swear that the original certified record inaccurately stated the actual charge to the jury. (Pomerantz Aff. ¶ 6).

In addition, the District Court's recollection of the actual charge is also corroborated by the court reporter's own draft transcript, the version ultimately adopted by the majority opinion long after oral argument as the new official record. The court reporter's version of the charge contained a finding paragraph (31a n.6) informing the jury that it could find Petitioners liable under the very theory of aiding and abetting a conspiracy contained in the disputed portions of the record, authored by the District Court.[4] As the majority opinion concedes that this jury finding charge was actually given, and was given "right in the middle of the disputed portion of the transcript" (45a), its undisputed accuracy corroborates the District Court's account that the District Court further described this basis for conspiratorial liability in the balance of the charge (as reflected in its handwritten notes). Under these circumstances, the record will not fairly support a conclusion that the District Court's sworn reaffirmation of the official record is unworthy of belief, as the majority opinion concludes. As Judge Oakes indicated in his dissent, a "sensible application" of the procedural default doctrine would require acceptance of "the district court's reconstruction where, as here, the challenge to the record was raised at too late a time without an adequate explanation for the delay." 88a.

Petitioners respectfully disagree with the Solicitor General's contention that this case fails to raise "any issue

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[4] Under well established Second Circuit precedent, there is no criminal offense of aiding and abetting a conspiracy. *See, e.g., United States v. Joyner*, 201 F.3d 61, 69 (2d Cir. 2000); *United States v. Benevenuto*, 836 F.2d 60, 71-72 (2d Cir. 1987); *United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir. 1987); *United States v. Orozco-Prada*, 732 F.2d 1076, 1081 (2d Cir. 1984).

of recurring importance." Opposition Brief, at 12. The Second Circuit's opinion that issues not raised in federal trial proceedings or in appellate briefs are nonetheless preserved for plenary appellate review, absent a litigant's knowing and intelligent waiver under *Johnson v. Zerbst*, poses substantial and recurring problems for the orderly administration of justice in federal courts. While the important interest of the federal judiciary in the orderly administration of justice provides a compelling reason for this Court to grant review, the judiciary's obligation to safeguard the due process and rule rights of appellate litigants to perfect their appeals upon a fixed and known record offers another sound reason for review. Indeed, the Solicitor General's refusal to endorse this extraordinary precedent is further evidence of its potential adverse consequences for all appellate litigants.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that their petition for certiorari should be granted.

Respectfully submitted,

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